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IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

DENNIS SOCHOR,
Petitioner,

v.

STATE OF FLORIDA
Respondent.

On Writ of Certiorari to the Supreme Court of Florida

BRIEF OF THE VOLUNTEER LAWYERS RESOURCE CENTER OF FLORIDA, INC. AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

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BRIEF OF THE VOLUNTEER LAWYERS RESOURCE CENTER OF FLORIDA, INC. AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

INTEREST OF *AMICUS CURIAE*

Written consent from all parties to the filing of this *amicus curiae* brief accompanies this document.

The Volunteer Lawyers' Resource Center of Florida, Inc. (VLRC) was established in November, 1988 for the purpose of providing support and assistance to private counsel who represent indigent, death-sentenced individuals on a pro bono basis in collateral post-conviction proceedings. Numerous death-sentenced individuals represented by pro bono counsel assisted by the VLRC were sentenced to death based in part on the aggravating circumstance that they committed a crime in an especially heinous, atrocious, or cruel manner over claims that this aggravator was unconstitutionally vague. As a result,

the VLRC has a strong interest in the resolution of this claim.

SUMMARY OF THE ARGUMENT

The Eighth Amendment to the United States Constitution requires clear and objective standards to guide the discretion of the sentencer and narrow the class of the death eligible. If an aggravating circumstance is used to narrow the class of death eligible and is weighed against mitigation to determine the appropriate sentence, then it must provide meaningful guidance; a vague aggravator applicable to any murder leaves the sentencer with the open-ended discretion condemned in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). *See Maynard v. Cartwright*, 486 U.S. 356, 108 S.Ct. 1853, 1859, 100 L.Ed.2d 372 (1988). Florida's statute aggravates a crime if it is "especially heinous, atrocious, or cruel." § 921.141(5)(h), Fla. Stat. (1989). As was the identical language of Oklahoma's aggravator in *Cartwright*, this wording is too vague to give meaningful guidance.

The Florida Supreme Court, considering all its case law, has not adopted a single, appropriately limited construction of this facially vague circumstance. It has instead created a large number of definitions of the circumstance, many traceable to the confusing language of its first opinion construing the aggravator, *State v. Dixon*, 283 So.2d 1, 9 (Fla. 1973), *cert. denied*, 416 U.S. 943 (1974). Although Justice Stewart's plurality opinion in *Proffitt v. Florida*, 428 U.S. 242, 255-6, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976) stated the expectation that Florida would limit the circumstance using one part of *Dixon's* language—that there be a conscienceless or pitiless crime which was unnecessarily torturous—Florida has instead created a menu of definitions, relying on numerous varying definitions of the circumstance.

Florida sometimes explicitly relies on all or some of the words of *Dixon*—that an evil, wicked, or vile crime

aggravates the sentence—which this Court in *Shell v. Mississippi*, 111 S.Ct. 313 (1990) held did not cure the facial vagueness of a heinous aggravator. The *Dixon* construction as a whole is similarly infected with these vague and inflammatory terms; the 'unnecessarily torturous' language in *Dixon* which potentially could limit the circumstance is instead listed as only one example of a heinous offense. Indeed, both Mississippi and Oklahoma, like Florida, relied on the vague phraseology of *Dixon* when they attempted, but failed, to correct their facially vague heinous circumstances. The Florida courts also rely on another part of *Dixon*—that some undefined additional act be present to make the murder especially heinous—to affirm heinousness findings.

Florida courts sometimes rely on other definitions which have no direct connection to *Dixon* to find crimes heinous. These alternates are themselves unlimited, e.g. deciding a method of killing can make a crime heinous, and then finding virtually any such method so qualified the offense. The Florida Supreme Court has also explicitly held that sentencers may rely on the undefined totality of the circumstances in finding a crime heinous, similar to the reasoning of the Oklahoma courts which caused the Tenth Circuit and this Court to strike Oklahoma's heinous aggravator.

Many of these alternate descriptions of what heinousness means have no limit; some have a potential limit, but the class of cases described as not heinous does not coincide with that class under other descriptions. None of these cases overrule one another except perhaps the statement in *Pope v. State*, 441 So.2d 1073 (Fla. 1984), that defining cruel as "designed to inflict a high degree of pain; *utter indifference to, or enjoyment of, the suffering of others; pitiless.*" should no longer be considered in defining the heinous circumstance. *Id.* at 1077. Because Florida has created and maintains multiple meanings of its heinous circumstance, many of which could

not limit the facially vague words of the statute, sentencers in Florida are left with a complete lack of meaningful guidance on what it means in any given case. The Florida Supreme Court's own flatly inconsistent holdings on factually indistinguishable cases show even that court cannot find meaningful guidance in its cases.

ARGUMENT

THE FLORIDA SUPREME COURT'S CONSTRUCTION OF THE HEINOUS, ATROCIOUS, OR CRUEL AGGRAVATING CIRCUMSTANCE FAILS TO OFFER ANY GUIDANCE TO OR PLACE ANY LIMITS ON THE DISCRETION OF THE SENTENCER RESULTING IN AN ARBITRARY SENTENCING SCHEME CONTRARY TO THE EIGHTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

A. The Constitution Requires Reasoned, Nonarbitrary Application of the Death Penalty Which Entails Use of Clear, Objectively Defined Guides to the Sentencers' Discretion and Limits to the Class of the Death Eligible.

In 1972, the United States Supreme Court struck the death penalty statutes then in force as contrary to the constitution's cruel and unusual punishment prohibition. *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). A plurality of this Court later explained this result:

> *Furman* mandates that where discretion is afforded a sentencing body on a matter so grave as the determination whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.

Gregg v. Georgia, 428 U.S. 153, 189, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976).

A vague aggravating circumstance that:

> fails adequately to inform juries what they must find in order to impose the death penalty and as a result leaves them and appellate courts with the kind of open-ended discretion which was held invalid in *Furman* . . .

violates the Eighth Amendment. *Maynard v. Cartwright*, 486 U.S. 356, 108 S.Ct. 1853, 1859, 100 L.Ed.2d 372 (1988). This is so because the vague aggravator:

> "fail[s] adequately to channel the sentencing decision patterns of juries with the result that a pattern of arbitrary and capricious sentencing like that found unconstitutional in Furman could occur" . . . [*quoting Gregg*, 428 U.S. at 195 n.46] To avoid this constitutional flaw, an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.

Zant v. Stephens, 462 U.S. 862, 876-7, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983). To narrow the class of the death eligible and channel the discretion of sentencers using aggravating circumstances requires "clear and objective standards so as to produce nondiscriminatory application." *Gregg*, 428 U.S. at 198, *quoting Coley v. State*, 231 Ga. 829, 834, 204 S.E.2d 612, 615 (1974); *see Godfrey v. Georgia*, 446 U.S. 420, 422, 432-3, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980); *see also McCleskey v. Kemp*, 481 U.S. 279, 107 S.Ct. 1756, 1774, 95 L.Ed.2d 262 (1987) (rejecting claim that racial disparities in application of death penalty show Eighth Amendment violation on the grounds that states are required to narrow sentencers' discretion by rational criteria which facts of particular case must meet).

B. Florida's Especially Heinous, Atrocious, or Cruel Aggravating Circumstance Is Facially Vague.

It is beyond cavil that the vagueness of permitting sentencers to aggravate a capital felony if they find that it "was especially heinous, atrocious, or cruel," § 921.141(5)(h), Fla. Stat. (1989), creates uncontrolled

sentencer discretion. *See Cartwright*, 108 S.Ct. at 1859; *Godfrey*, 446 U.S. at 433) (vile, horrible, inhuman aggravator violates Eighth Amendment); *Walton v. Arizona*, —— U.S. ——, 110 S.Ct. 3047, 3057, 111 L.Ed.2d 511 (1990). The *Cartwright* decision squarely addresses this issue:

> First, the language of the Oklahoma aggravating circumstance at issue—"especially heinous, atrocious, or cruel"—gave no more guidance than the "outrageously or wantonly vile, horrible, or inhuman" language that the jury returned in its verdict in *Godfrey* . . . To say that something is "especially heinous" merely suggests that the individual jurors should determine that the murder is more than just "heinous," whatever that means, and an ordinary person could honestly believe that every unjustified, intentional taking of human life is "especially heinous."

Cartwright, 108 S.Ct. at 1859. Florida's statute is identical, and the unanimous opinion in *Cartwright* compels the finding that its words are identically vague.

C. Numerous Definitions of Florida's Heinous Aggravating Circumstance Exist, Some Unlimited and Some Potentially Limited in Varying Ways.

A state court may construe a vague capital sentencing aggravator to save it from constitutional attack. *See Walton*, 110 S.Ct. at 3057; *Lewis v. Jeffers*, —— U.S. ——, 110 S.Ct. 3092, 111 L.Ed.2d 606 (1990). In *Walton*, this Court found the Arizona Supreme Court had successfully limited its definition of its especially heinous, cruel, or depraved aggravator. *Walton*, 110 S.Ct. at 3051. The Arizona Court had undertaken to define each of the disjunctive phrases. The Arizona courts defined 'cruel' as inflicting "mental anguish or physical abuse before the victim's death," and mental anguish includes the victim's uncertainty over his fate. *Id.* at 3057-8. 'Depraved' under the statute means relishing the murder or indifference to suffering together with a sense of pleas-

ure. *Id.* at 3058. This court found that each definition "gives meaningful guidance to the sentencer." *Id.* at 3058; *see Lewis*, 110 S.Ct. at 3100.

The Florida Supreme Court has never adopted a single limiting construction of the heinous aggravator that would provide meaningful guidance to the sentencers.[1] Instead, it has stated numerous varying definitions of the aggravator. Some of these definitions provide no limit at all; others could potentially provide a limit, but the Florida Supreme Court has never overruled contrary definitions of the heinous aggravating circumstance appearing in other cases. Because that court has never held that one limited definition and only that limited definition is the proper construction of Florida's heinous circumstance, it has failed to limit the aggravator by a clear and objective principle which provides meaningful guidance to the sentencer. In any particular case, trial courts and the Florida Supreme Court itself have a menu of definitions of the heinous aggravating circumstance from which to choose; since some of those menu choices apply to all crimes and virtually any capital crime could fit into one of the other varying, if potentially limited definitions, this construction of the circumstance does not provide meaningful guidance even to those aware of the case law.[2]

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[1] This brief will refer to the especially heinous, atrocious, or cruel aggravating circumstance as the heinous aggravating circumstance; as will be seen, Florida has not defined and applied the disjunctive phrases of the circumstance as did Arizona, but instead applied the circumstance as a whole to each crime.

[2] In this case, Mr. Sochor's jury was never told any definition of the heinous aggravating circumstance beyond the statute's vague words. *Walton* distinguishes *Cartwright* in part because the Oklahoma jury was never informed of any limit to the Oklahoma aggravator whereas in Arizona, the judge sentenced and presumably knew the law. In this sense, Mr. Sochor's case is much closer to *Cartwright*, but this argument is beyond the scope of this brief.

1. *The Lengthy Construction of the Heinous Circumstance Appearing in* State v. Dixon *Does Not Itself Limit the Heinous Circumstance and Has Been Broken Down to Several Components, Some of Which Are Unlimited, Yet Have Been Relied Upon To Find the Circumstance.*

In its first ruling on Florida's post-*Furman* death statute, the court defined the aggravator thusly:

> It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies—the conscienceless or pitiless crime which is unnecessarily torturous to the victim.

State v. Dixon, 283 So.2d 1, 9 (Fla. 1973), *cert. denied*, 416 U.S. 943 (1974). This construction has three parts:

> 1) the 'definitions' of heinous, atrocious, and cruel, including that they are evil, wicked, or vile;
>
> 2) a kind of crime intended to be included, namely one accompanied by additional acts setting it apart from other capital felonies;
>
> 3) and, another example, "the conscienceless or pitiless crime which is unnecessarily torturous to the victim."

When this Court first considered the constitutionality of Florida's death statute, its plurality opinion by Justice Stewart assumed that the aggravator would not be found unless part three of *Dixon*'s definition were present to limit and guide the sentencer:

> As a consequence, the [Florida Supreme Court] has indicated that the eighth statutory provision is directed only at "the conscienceless or pitiless crime which is unnecessarily torturous to the victim" . . . [cities omitted] We cannot say that the provision as so construed, provides inadequate guidance to those charged with the duty of recommending or imposing sentences in capital cases.

Proffitt v. Florida, 428 U.S. 242, 255-6, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); *see also Lewis*, 110 S.Ct. at 3099 (*Proffitt* approved Florida's heinous aggravator when restricted to "the conscienceless or pitiless crime which is unnecessarily torturous to the victim.")

Although this Court in *Proffitt* indicated *Dixon*'s unnecessarily torturous portion would be a *sine qua non* of heinousness in Florida, the Florida Supreme Court sometimes cites any one or more of *Dixon*'s three parts and sometimes none at all when it defines the circumstance. Some cases cite to the full *Dixon* construction without further elucidation. *See e.g. Lucas v. State*, 376 So.2d 1149, 1153 (Fla. 1979); *see also In re Standard Jury Instructions Criminal Cases—No. 90-1*, 579 So.2d 75 (Fla. 1991) (adopting standard jury instruction similar to *Dixon*'s construction to address problems in light of *Cartwright*). Numerous cases find the aggravator applies because the crime was "evil," "wicked," "atrocious," or some similarly vague term, standing alone. *See e.g. Hargrave v. State*, 366 So.2d 1, 5 (Fla.), *cert. denied*, 444 U.S. 919 (1979) (when defendant shot victim twice in holdup, then waited for store customer to leave and 'executed' victim, crime was extremely wicked and shockingly evil); *Swafford v. State*, 533 So.2d 270 (Fla. 1988), *cert. denied*, 109 S.Ct. 1578 (1989) (upholding aggravator because victim must have felt fear and killing by nine shots, most at extremities, showed "a wanton atrocity."); *Johnson v. State*, 393 So.2d 1069, 1073 (Fla.), *cert. denied*, 454 U.S. 882 (1981) (robbery victim had gun battle with robber, then raised his arms; robber cursed him and shot him to death; murder was "atrocious and cruel and was committed to reek revenge" on victim).

Inasmuch as Florida relies on *Dixon*'s initial list of definitions to limit the circumstance, Florida has placed its foundation on a hill of mud. This Court held juries instructed:

> "[T]he word heinous means extremely wicked or shockingly evil; atrocious means outrageously wicked and vile; and cruel means designed to inflict a high degree of pain with indifference to, or even enjoyment of the suffering of others."

are left with an unconstitutional lack of guidance in applying the death penalty. *Shell v. Mississippi*, 111 S.Ct. 313 (1990) (Marshall, J., concurring), *quoting Shell v. State*, 554 So.2d 887, 906-6 (Miss. 1989);[3] *see also Cartwright v. Maynard*, 822 F.2d 1477, 1488 (10th Cir. 1987) (en banc), *aff'd*, 486 U.S. 356 (1988) (holding this identical instruction given to Cartwright's jury insured uncontrolled discretion of that sentencer). The Tenth Circuit set out the problem with the 'definitions' most succinctly: "These terms simply elude objective definition." *Cartwright*, 822 F.2d at 1489. The first part of *Dixon*'s construction alone cannot guide sentencers for the same reason: it makes the aggravator more vague, not less.

The full *Dixon* definition of the heinous aggravator similarly does not limit the facially vague words of the aggravating circumstance by its own terms. It begins with the very words condemned in *Shell* and *Cartwright* as meaningless and applicable to all first degree murders. These words invite an emotional, inflamed response by the sentencer; none could find a defendant guilty of first degree murder and not be moved when told to condemn the man if the crime was "evil." *Dixon's* construction describes conscienceless or pitiless crimes which are unnecessarily torturous *not* as a *limit* to these vague, inflammatory phrases, but merely as a kind of crime "intended to be included" as heinous. *Dixon*, 283 So.2d at 9.

[3] Mississippi derived its vague instruction from the first part of *Dixon*'s construction. *See Wiley v. State*, 484 So.2d 339, 353 (Miss. 1986), *cert. denied*, 479 U.S. 906 (1986).

Adding an example of a heinous offense after a definition which applies to any first degree murder limits Florida's aggravator no better than the examples of heinous crimes on which the Oklahoma courts relied to affirm *Cartwright*. *See Cartwright*, 822 F.2d at 1489-1492; *see also Eddings v. Oklahoma*, 455 U.S. 104, 109 n.4, 102 S.Ct. 869, 71 L.7d.2d 1 (1982) (in reversing *Eddings v. State*, 616 P.2d 1159 (Okla. Ct. Crim. App. 1980) on other grounds, questioned whether the heinous aggravator constitutionally applied where the Oklahoma court had relied on the full *Dixon* construction of the aggravator.).

The Florida Supreme Court recently relied on a similar definition of the circumstance in its new standard instruction. However, this instruction changed the words of *Dixon*—relied on as a limit to the aggravator by this Court in *Proffitt*—from a "conscienceless or pitiless crime which is unnecessarily torturous to the victim," *Dixon*, 283 So.2d at 9; to:

> The kind of crime intended to be included as heinous, atrocious, or cruel is one accompanied by additional acts that show that the crime was conscienceless or pitiless and was unnecessarily torturous to the victim.

Standard Jury Instructions, 579 So.2d at 75.[4] This change means that a crime which was 'conscienceless,' regardless of whether it was pitiless and torturous, would be especially heinous. Aggravating conscienceless first degree murders violates the teachings of *Cartwright*: a juror could fairly find a "cold-blooded, pitiless crime' in any first degree murder because the phrase is entirely subjective. *See Creech v. Arave*, 928 F.2d 1481, 1492 (9th Cir. 1991). Saying that conscienceless first degree murders are especially heinous turns the circumstance into a catch-all aggravator since that phrase is so subjective, like "coldblooded, pitiless," that anyone commit-

[4] The Florida Supreme Court has historically relied upon the standard jury instructions it promulgates as authority for its holdings in capital cases. *See Pope v. State*, 441 So.2d 1073, 1078 (Fla. 1984); *Campbell v. State*, 571 So.2d 415, 420 (Fla. 1990).

ting first degree murder could fairly be described as conscienceless. One is hard pressed even to imagine a conscionable murder. This construction places complete and unreviewable discretion in the hands of the sentencer, just as did the pre-*Furman* statutes, contrary to the Eighth Amendment.

The facts of *Lucan* show the extreme width of *Dixon's* full construction. In *Lucas*, the defendant shot his ex-wife who ran into her house, and then caught her and shot her to death after a struggle; the Florida Supreme Court held this crime was especially heinous relying on the full Dixon construction. *Lucas*, 376 S.2d at 1153. The facts of *Lucas* are virtually indistinguishable from those in *Cartwright* and *Godfrey*. In *Cartwright*, the defendant whom the victim had let go from his job, confronted and shot the victim's wife at their house after a struggle. He then went to the victim and shot him to death, returned to the victim's wife and tried again to kill her. *Cartwright*, 108 S.Ct. at 1856. In *Godfrey*, the defendant shot and killed his estranged wife through a window of a trailer, came inside, struck his daughter with the gun, and then shot his mother-in-law to death. *Godfrey*, 446 U.S. at 425. This Court ruled the heinousness finding in *Cartwright* and vileness finding in *Godfrey* unconstitutionally expanded those circumstances to virtually any first degree murder. The *Lucas* opinion shows Florida has done the same insofar as the Florida courts rely on the full, vague *Dixon* construction, just as the Mississippi and Oklahoma courts did.

The second portion of *Dixon's* heinousness definition standing alone is also used as a basis for finding the aggravator. The Florida Supreme Court simply cites to *Dixon's* language that refers to the presence of additional acts that set the crime apart from the norm of capital felonies. This part of *Dixon's* construction removes all boundaries on the circumstance since the nature of these "additional acts" is completely undefined and open-ended. In *Harvard v. State*, 414 So.2d 1032 (Fla. 1982), *cert. denied*, 459 U.S. 1128 (1983), the defendant, having

harassed his ex-wife during their separation of several months, followed her from work, pulled next to her car, and killed her instantly with a single shotgun blast to her neck. The Florida court held stalking and harassment "constitute sufficient 'additional acts' to justify application of the heinous, atrocious, or cruel aggravating factor." *Id.* at 1036; *see Phillips v. State*, 476 So.2d 194 (Fla. 1985) (heinousness found when victim stalked by defendant who shot him, chased him and then shot him to death).

At times, the Florida Supreme Court also relies on *Dixon's* unnecessarily torturous language in conjunction with *Dixon's* additional acts definition. In some cases, the Florida Supreme Court has struck the heinous aggravator when the victim died quickly from a gunshot, but still left open the possibility that some unspecified 'additional acts' may make the offense heinous. *See e.g. Burns v. State*, 16 Fla.L.W. S389, S391 (Fla. May 16, 1991). In *Wilson v. State*, 436 So.2d 908, 912 (Fla. 1983), the court similarly struck the aggravator for a victim who had been stabbed once in the chest finding nothing about the crime torturous, conscienceless, or set apart from the norm of capital felonies. In *Breedlove v. State*, 413 So.2d 1 (Fla.), *cert. denied*, 459 U.S. 882 (1982), the Court showed that the "additional acts" are not limited to torturous acts and may be anything at all. Breedlove's victim suffered a single stab wound:

> While pain and suffering alone might not make this murder heinous, atrocious, and cruel, the attack occurred while the victim lay asleep in his bed. This is far different than the norm of capital felonies and sets this crime apart from murder committed in, for example, a street, a store, or other public place.

Id. at 9; *see Troedel v. State*, 462 So.2d 392, 398 (Fla. 1985). *Breedlove* shows that the 'additional acts' language does not require additional torturous acts. Left undefined by *Dixon's* construction and subsequent case-law, this part of *Dixon*—upon which the Court will rely

to affirm cases regardless of any unnecessary suffering—leaves the aggravator completely open-ended, not limited.

Sometimes, the court will apply what could be a limited definition. In *Cheshire v. State*, 568 So.2d 908 (Fla. 1990), the court struck the heinous aggravator when the defendant quickly shot two people to death. The court connected the third part of *Dixon's* construction with the definition of "cruel" in its first part, ignoring the rest:

> The factor of heinous, atrocious or cruel is proper only in torturous murders—those that evince extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another. *State v. Dixon* . . . .

Id. at 912; *see Shere v. State*, 579 So.2d 86, 95-6 (Fla. 1991); *McKinney v. State*, 579 So.2d 80 (Fla. 1991); *see* also *Porter v. State*, 564 So.2d 1060, 1063 (Fla. 1990), *cert. denied*, 111 S.Ct. 1024 (1991) (striking aggravator because crime not meant to be painful, citing to full *Dixon* construction, but emphasizing last two parts); *Smalley v. State*, 546 So.2d 720 (Fla. 1989) (rejecting constitutional attack on aggravator, citing full *Dixon* construction as its meaning and claiming aggravator limited to "those conscienceless or pitiless crimes which are unnecessarily torturous to the victim."). Despite language in *Smalley* to the contrary, the Florida Supreme Court ruled in *Pope v. State*, 441 So.2d 1073 (Fla. 1984), that defining cruel as "designed to inflict a high degree of pain; *utter indifference to, or enjoyment of, the suffering of others; pitiless.*" positively misleads sentencers on the meaning of the circumstance. *Id.* at 1077. The court noted with approval that the jury was instructed in the bare words of the statute and said "No further definitions of the terms are offered, nor is the defendant's mindset ever at issue." *Id.* at 1078; *see Stano v. State*, 460 So. 2d 890, 893 (Fla.), *cert. denied*, 471 U.S. 1111 (1985) (heinous aggravator goes to nature of the killing, not mindset of perpetrator); *Hitchcock v. State*, 578 So.2d 685, 692 (Fla.), *cert. denied*, 112 S.Ct. 311 (1991) (victim suffering, regardless of the perpetrator's mindset, establishes heinous circumstance).

However, the court will rely on conscienceless/pitiless mental states to qualify a crime as heinous even though no torturous acts occurred. The words of *Dixon* itself indicate a mentally or physically torturous killing has been but a reason to find the aggravator, not a limit on it. *See Vaught v. State*, 410 So.2d 147, 151 (Fla. 1982); *see also Santos v. State*, 16 Fla.L.W. S633, S634 (Fla. September 26, 1991) (factor applies to "torturous murders involving extreme and outrageous depravity. A murder *may* fit this description if it exhibits a desire to inflict . . ." or indifference to suffering.) In *Vaught*, the defendant attempted to rob a gas station with a gun while wearing a mask. The owner exposed the man's face, saying "I know you and I know where you live," and was shot dead. *Vaught*, 410 So.2d at 148. The court approved a heinousness finding because the crime was cold and calculating, rejecting a claim heinousness was limited to cases in which pain or anguish were inflicted. *Id.* at 151; *see also Buenoano v. State*, 527 So.2d 194, 199 (Fla. 1988) (heinousness approved because victim suffering and methodical nature of killing made it conscienceless and pitiless).

Despite this Court's expectation—stated in *Proffitt*—that *Dixon* would be taken to mean that only conscienceless or pitiless crimes which are unnecessarily torturous would be found heinous, the Florida Supreme Court has not so interpreted *Dixon*. In *Pope*, the court ruled the parts of *Dixon* which this Court believed limited the circumstance when it decided *Proffitt* were no longer the law. Numerous definitions, derived from *Dixon*, have been applied to find a crime heinous. Some are completely unlimited; some may be limited, but conflict with other definitions which include differing classes of cases as heinous. In short, Florida, like Mississippi and Oklahoma, has not interpreted *Dixon* in a way which limits the facially vague heinous, atrocious, or cruel circumstance. Moreover, that court has created and applied other construc-

tions of the circumstance even more removed from *Dixon's* language upon which it relies to find crimes are heinous.

2. *The Florida Supreme Court Sometimes Relies on the Manner or Mode of Killing as the Definition of the Aggravating Circumstance in a Way Which Allows Virtually Any First Degree Murder to be Aggravated Thereunder.*

The various permutations of *Dixon*'s language do not exhaust the wide range of choices facing a Florida sentencer peering at the menu of heinousness meanings. As an alternative to reliance on all or part of the *Dixon* construction, at times the Florida Supreme Court relies on the manner of killing as a basis for affirming the heinous aggravator. Under this approach, killings by methods other than shooting almost automatically qualify as heinous (with some limited, arbitrarily applied exceptions); killings by shooting may be found not to be heinous, but no objective limiting principle has been articulated to distinguish those shootings which are heinous from those which are not. The court has held: "The intent and method employed by the wrongdoers is what needs to be examined." *Mills v. State*, 476 So.2d 172, 178 (Fla. 1985), *cert. denied*, 475 U.S. 1031 (1986). Assuming this categorization has been followed, shootings are the only class of cases in which the aggravator has been struck with any frequency.[5]

[5] Not counting cases in which the opinion is unclear what aggravators were found and not considering those instances in which the jury was instructed on the circumstance but the trial court did not find it, the trial court found the heinous aggravator and imposed death in at least 183 cases between January, 1984 and November 1991. These cases are listed in Appendix A. The Florida Supreme Court struck these findings in 38 of these 183 cases. In all but five of the 38, the victim had been shot to death; since 1973, the Florida Supreme Court has reversed heinousness findings for non-shooting death cases only ten times. *See Rhodes v. State*, 547 So.2d 1201 (Fla. 1989) (strangulation on semi-conscious victim); *Rembert v. State*, 445 So.2d 337, 338 (Fla. 1984) (victim hit on head one or two times); *Scull v. State*, 533 So.2d 1137 (Fla. 1988), *cert. denied*, 490 U.S. 1037 (1989) (one victim killed by a blow to the head); *Bundy v. State*, 471 So.2d 9 (Fla. 1985), *cert. denied*, 479 U.S. 894 (1986) (cause and manner of death unknown); *Cherry v. State*, 544 So.2d 184, 188 (Fla. 1989), *cert. denied*, 110 S. Ct. 1835 (1990) (elderly man who died of heart attack during offense); *Herzog v. State*, 439 So.2d 1372, 1379-80 (Fla. 1983) (strangulation of unconscious victim); *Demps v. State*, 395 So.2d 501, 505-6 (Fla.), *cert. denied*, 454 U.S. 933 (1981) (victim stabbed repeatedly); *Wilson v. State*, 436 So.2d 908 (Fla. 1983) (single stab wound to the chest); *Halliwell v. State*, 323 So.2d 557, 561 (Fla. 1975) (victim beaten to death); *Simmons v. State*, 419 So.2d 316 (Fla. 1982) (two blows either of which could have caused instantaneous death).

The Florida Supreme Court routinely finds the heinous aggravator applies to any other method of killing. It usually finds strangulations heinous. *See Hitchcock*, 578 So.2d at 693 (citing cases). The court also routinely finds death by smothering to be heinous. *See Capehart v. State*, 16 Fla. L.W. S447, S449 (Fla. June 13, 1991). Burning another to death has always been found to be especially heinous. *See Henry v. State*, 16 Fla.L.W. S593 (Fla. August 29, 1991); *Nixon v. State*, 572 So.2d 1336 (Fla. 1990); *Way v. State*, 496 So.2d 126 (Fla. 1986). In a case in which the victim was painfully poisoned, the Florida Supreme Court upheld the heinousness finding because the suffering and methodical nature of the killing made it conscienceless and pitiless. *See Buenoano*, 527 So 2d at 199.

Likewise, stabings are almost routinely found heinous. *See Floyd v. State*, 569 So.2d 1225, 1232 (Fla. 1990), *cert. denied*, 111 S.Ct. 2912 (1991) (although one stab wound probably fatal within minutes, multiple stabbing made crime especially heinous); *Trotter v. State*, 576 So.2d 691, 694 (Fla. 1990) (citing cases). Although the Florida court once said a one stab murder was "not such as to make the manner of death unnecessarily torturous or conscienceless and set apart from the norm of capital felonies," *Wilson*, 436 So.2d at 912, that was the only case in which the Florida Supreme Court struck a one-stab murder.[6] That court has twice found crimes espe-

[6] In a single case, without explanation, the court struck a multiple-stab murder. *See Demps*, 395 So.2d at 505-6.

cially heinous when the victim died from a single stab wound. *See Proffitt v. State*, 315 So.2d 461 (Fla. 1975), *aff'd*, 428 U.S. 242 (1976);[7] *Breedlove*, 413 So.2d at 9.

Similarly, beatings are almost always found to be heinous, atrocious, or cruel. *See Penn v. State*, 574 So.2d 1079, 1083 (Fla. 1991) (defendant beat sleeping mother to death with a hammer, causing numerous wounds including 'defensive wounds;' heinousness upheld); *Cherry*, 544 So.2d at 188 (five blows to head area, possibly by a fist, killing elderly victim is especially heinous crime); *Roberts v. State*, 510 So.2d 885 (Fla. 1987), *cert. denied*, 485 U.S. 943 (1988) (citing cases). In *Roberts*, the victim died from an unexpected series of blows to the back of his head. However, since there were defensive wounds to the victim's hands, the court held that sufficed to make the crime especially heinous. *Id.* at 894. The court has said that a single blow killing instantly would not make the crime especially heinous.[8] *See Scull*, 533 So.2d at 1142; *Rembert*, 445 So.2d at 338; *Simmons*, 419 So.2d at 319. However, the number of beating deaths in which death is instantaneous, given the nature of the method, must necessarily be small.

Any notion that the court has limited the heinous factor to those cases in which the method of killing is instantaneous or virtually instantaneous is rebutted by its treatment of killings by gunshot. The court has written "Moreover, the fact that mutiple gunshots wounds were inflicted is not, by itself, sufficient to support a finding of heinous, atrocious, or cruel." *Shere v. State*, 579 So.2d 86, 96 (Fla. 1991); *see Burns v. State*, 16 Fla.L.W. S389, S391 (Fla. May 16, 1991) (citing cases). The court has struck heinousness in a number of shooting cases.

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[7] The fact that Proffitt killed with one stab appears in the Eleventh Circuit's opinion on Proffitt's habeas petition. *See Proffitt v. Wainwright*, 685 F.2d 1227, 1264-6 (11th Cir. 1982), *modified*, 706 F.2d 311, *cert. denied*, 464 U.S. 1002 (1983).

[8] In *Halliwell*, 323 So.2d at 561, however, the court struck the heinousness factor although the defendant beat the victim to death using repeated blows.

Despite this language, even in shooting cases, Florida has not limited the heinous circumstance. Perusing cases in which the court finds the aggravator although there *was* a shooting death demonstrates that virtually any fact may be relied upon by the Florida Supreme Court to find heinousness, thus making it open-ended rather than limited.

Numerous additional facts can make a shooting death an especially heinous offense. Emotional suffering by the victim, including any fear before death, can make a shooting death especially heinous. *See e.g. Farinas v. State*, 569 So.2d 425, 431 (Fla. 1990). The court has said a short period of awareness before death will not suffice to make an offense especially heinous, but cases show that any awareness at all may make a crime especially heinous. *See Ibid.; Huff v. State*, 495 So.2d 145 (Fla. 1986). In *Huff*, the only awareness the victim had that he was to be harmed was the time it took for him to raise his hand after finding his son pointing a gun at him, yet that was sufficient to make the crime especially heinous. *Id.* at 153.

However, the converse is not true. The court has found the crime heinous for shooting a victim completely unaware of danger, apparently because that would be an execution. *See Buford v. State*, 403 So.2d 943 (Fla. 1981), *cert. denied*, 454 U.S. 1164 (1982) (shooting a sleeping victim heinous, citing *Spinkellink v. State*, 313 So.2d 666 (Fla. 1975), *cert. denied*, 428 U.S. 911 (1976)). Putting these cases together shows *any shooting crime could* be found heinous because either the victim is aware of the danger and so emotionally strained, making the offense heinous, or unaware of the crime, making the offense heinous as an execution.

Another kind of fact frequently cited which makes a shooting death heinous is the victim's suffering after being shot. The court has sometimes said such suffering is irrelevant to heinousness. *See Teffeteller v. State*, 439 So.2d 840, 846 (Fla. 1983), *cert. denied*, 465 U.S. 1974 (1984); *Mills*, 476 So.2d at 178. More frequently, the

court considers this suffering in deciding whether the crime was especially heinous. *See e.g. Ponticelli v. State*, 16 Fla.L.W. S669 (Fla. October 10, 1991). The court will rely on the victim's experience of pain when the first shot was not fatal, but was then immediately shot to death to hold the crime heinous. *See Squires v. State*, 450 So.2d 208 (Fla.), *cert. denied*, 469 U.S. 892 (1984); *Troedel v. State*, 462 So.2d 392, 398 (Fla. 1984). Thus, killing with any more than one shot will qualify the crime as heinous.

Assuming arguendo that murders by quick shooting without awareness of impending death were a clear, objective principle to distinguish the aggravator, the resulting class of cases to which the aggravator may apply—any murder in which the killing occurred by multiple shots or any other method of killing other than one shot or in which the victim experienced any pain or any awareness of danger or in which the victim was unaware of danger—is an overly wide class. A murder not qualifying to be especially heinous is a rare, perhaps nonexistent, exception; the aggravator is randomly not found in a capricious fashion. A sentencer selecting this item from the heinousness menu has unlimited discretion.

3. *The Suffering of the Victim Has Been Used as a Reason to Find the Heinous Aggravator, but Has Been Read to Qualify Virtually All First Degree Murders as Especially Heinous.*

A Florida sentencer may choose yet another item from the menu to decide if a crime is heinous. Many cases speak of victim suffering as establishing the aggravator. The court states:

> In determining whether the circumstance of heinous, atrocious and cruel applies, the mind set or mental anguish of the victims is an important factor. *Phillips v. State*, 476 So.2d 194 (Fla. 1985).

Harvey v. State, 529 So.2d 1083, 1087 (Fla. 1988), *cert. denied*, 489 U.S. 1040 (1989). Since Harvey's burglary

victims became aware of their danger when they heard the perpetrators discuss killing the witnesses and tried to run before being shot, the heinous circumstance applied. *See Hitchcock*, 578 So.2d at 693 (if crime unnecessarily torturous to the victim, regardless of perpetrator's mindset, it is heinous); *Capehart*, 16 Fla.L.W. at S449.

Yet, victim suffering has not limited the circumstance. The Florida Supreme Court explicitly held victim suffering need not be present to find the aggravator in *Vaught*, 410 So.2d at 151. There are a multitude of cases in which the victim suffers no or almost no physical pain and no or only very brief emotional strain, yet Florida courts aggravate the crime as especially heinous. This Court recognizes that utilizing a very short period of fear before a quick death to justify a heinousness finding makes that agravator as wide as the class of first degree murders. In *Godfrey*, this Court found the application of the aggravator to the facts of that case constituted unchannelled discretion; the second killing there occurred after the victim saw her daughter shot to death, after her grandchild was struck by a gun butt, and after the killer broke in to gun the undoubtedly terrified woman down in her house. In *Cartwright*, the victim undoubtedly heard his wife struggle with an intruder, heard her cries as she was shot twice, and faced his ex-employee assailant carrying a weapon in his living room. Although the victim had to have been terrified, this Court found that applying heinousness to his shooting death showed the aggravator was vague.

Florida cases show that victim suffering similarly does not appropriately limit Florida's heinous circumstance. Many of the cases examined above have found a crime heinous even though the victim felt no or a short period of pain and had no or little time to be afraid before death. *See Harvard, supra* ('stalking' ex-wife made crime especially heinous although she was killed instantly without foreknowledge of death by shotgun blast); *Lucas, supra* (defendant shot his ex-wife, caught her as she ran, struggled with her, and then shot her to death); *Vaught*,

supra (defendant shot robbery victim who had torn off defendant's mask); *Huff, supra* (victim turned to see his son pointing a gun at him, raised his hand, and was shot to death); *Johnson, supra* (robbery victim had gunbattle with robber, then raised his arms; robber shot him to death); *see also Christopher v. State*, 407 So.2d 198, 202 (Fla. 1981), *cert. denied*, 456 U.S. 910 (1982) (explained below). A number of other cases are to like effect. In *Spinkellink*, 313 So.2d 666, the defendant shot a sleeping victim to death, yet the finding that the crime was heinous was upheld. *See Buford*, 403 So.2d at 952. In *Gibson v. State*, 351 So.2d 948 (Fla. 1977), *cert. denied*, 435 U.S. 1004 (1978), the defendant started a robbery by telling one victim to get out of his car. As the man got out, asking not to be shot, Gibson shot him twice in the head, killing him. The trial court found the crime heinous solely because Gibson planned the robbery and shot the victim; the appellate court did not disturb this finding. *Id.* at 951 n.5. A parole officer was apparently surprised by the defendant in the office parking lot in *Phillips v. State*, 476 So.2d 194 (Fla. 1985). Phillips shot him twice in the chest; the officer ran a short distance where Phillips shot him repeatedly in the head and back, killing him. The Florida Supreme Court upheld the heinous aggravator solely due to the anguish the victim must have felt as he ran that short distance. *Id.* at 197. In *Ford v. State*, 374 So.2d 496 (Fla. 1979), *cert. denied*, 445 U.S. 972 (1980), the defendant shot the victim twice without warning and then, as the victim asked for help, shot and killed him, yet the Florida courts found the crime heinous. *Id.* at 503. To like effect is *Troedel*, 462 So.2d at 398; there a victim survived the first shot to his head before being shot to death. The Florida Supreme Court held this crime was especially heinous because two shots were used and the murder occurred in the victims' home. In *Farinas*, 569 So.2d at 431, the defendant forced his estranged girlfriend into his car. When she jumped out and ran away at an intersection, he shot at her, hitting her spine, then, unjamming his gun, shot her to death. The Florida Supreme Court found the crime especially heinous, supposing

the victim was in fear for her life as she ran and was conscious after the first shot, knowing she would be killed. In none of these cases was the victim's fear prolonged and in none was the physical pain, if any, more than that encountered in virtually any killing, yet the Florida courts found the crimes heinous.

Although the court struck the heinous aggravator in *Herzog*, 439 So.2d at 1379-80 because the victim was not conscious while being strangled, thus suggesting victim awareness is required for the aggravator to be found, in *Jennings v. State*, 453 So.2d 1109 (Fla. 1984), *vacated*, 470 U.S. 1002, *rev'd on other grounds*, 473 So.2d 204 (Fla. 1985), the Florida Supreme Court rejected a contention that heinousness did not apply because the victim may have been unconscious for the entire incident.[9] The court said mental anguish can establish heinousness, but "As important is the totality of the circumstances of the incident and whether they reflect that this was a conscienceless, pitiless, and unnecessarily torturous crime that sets it apart from the norm of capital felonies." *Id.* at 1115. Since the defendant kidnapped, raped, and killed a young girl, the court found this crime qualified. In *Thomas v. State*, 374 So.2d 508 (Fla. 1979), *cert. denied*, 445 U.S. 972 (1980), the defendant shot and killed a man during a robbery and then sexually abused the victim's wife. The trial court found the circumstance because of the cruelty to the *wife*, yet the Florida Supreme Court did not upset this finding, apparently relying on the completely open-ended totality of the circumstances. *Id.* at 511 n.1.

Inasmuch as a victim suffering limit is applied, it is subjective, not objective. Almost no murders have abso-

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[9] On the first direct appeal, the court also found the victim had been unconscious during this incident. *Jennings v. State*, 413 So.2d 24 (Fla. 1982). After retrial, the Florida court summarily upheld the heinous aggravator on appeal without addressing the question whether the victim was unconscious or the effect that would have on the aggravation. *Jennings v. State*, 512 So.2d 169 (Fla. 1987).

lutely no fear, as this Court recognized by striking the aggravators in *Godfrey* and *Cartwright* despite short periods of victim terror. Florida has no identifiable, objective rule on how much fear qualifies an offense as heinous. Absent such on objective rule, deciding if a crime is especially heinous because of victim fear becomes completely subjective and arbitrary. Comparing the conflicting results in the cases demonstrates this arbitrariness.

Unchannelled subjectivity appears in decisions where a victim attempts to escape by running or fighting, but then is shot to death. Sometimes the victim's fear makes the crime especially heinous and sometimes not. In *Lewis v. State*, 377 So.2d 640 (Fla. 1978), the defendant shot the victim in the chest and as the victim fled, shot him several times in the back. The court found this crime not heinous. *Id.* at 646; *see also Amoros v. State*, 531 So.2d 1256 (Fla. 1988) (crime not heinous when victim attempted to escape, but trapped at locked door and shot to death). Yet, in *Phillips*, 476 So.2d at 197, the defendant shot the victim twice in the chest, chased him down after a short distance, and then gunned down; this offense was heinous.

Subjectivity appears when a struggle precedes a quick death. In *Brown v. State*, 526 So.2d 903 (Fla.), *cert. denied*, 488 U.S. 944 (1988), the defendant shot a policeman in the arm with the officer's firearm after a struggle. This caused the officer "excruciating pain" in the words of the trial court. The officer begged not to be killed, but the defendant shot him fatally twice more in the head. The Florida Supreme Court struck the heinous circumstance. Yet, in *Grossman v. State*, 525 So.2d 833 (Fla. 1988), *cert. denied*, 489 U.S. 1071 (1989), the defendant struggled with a policewoman after being stopped, hitting her with her flashlight. The officer fired her gun, but the defendant wrestled the weapon away and shot her once, killing her. The Florida courts found this crime especially heinous because the beating was ferocious, and the officer knew she was fighting for her life.

Because almost all murders involve some element of fear, defining heinousness in terms of a victim's emotional suffering, to the extent that it is done, gives the sentencer no meaningful guidance in the absence of some more objective guidelines. *Lewis*, *Phillips*, *Brown*, and *Grossman* show that even the Florida Supreme Court itself cannot find adequate guidance from its cases to reach consistent results. These cases do not provide trial courts with meaningful guidance, but rather leave them on a dark and foggy sea without a lighthouse when trying to discern whether the facts of the case they are deciding are 'especially heinous.'

4. *The Florida Supreme Court Has Eschewed Any Definition of the Heinous Aggravator and Deferred to an Unlimited Exercise of Judgment.*

Most tellingly, the Florida Supreme Court has explicitly abandoned any pretense that it has limited the heinous aggravator by objective, identifiable limits and instead has allowed sentencers to rely on any aspect of the crime to find heinousness. *See Cherry v. State*, 544 So.2d 184, 187 (Fla. 1989), *cert. denied*, 110 S.Ct. 1835 (1990) (citing full *Dixon* definition, but noting "there is no mechanical litmus test" for the aggravator); *Jennings*, 453 So.2d at 1115 (although victim may have been unconscious during entire incident, heinous aggravator upheld; court looks to undefined totality of the circumstances to determine heinousness); *Magill v. State*, 428 So.2d 649 (Fla.), *cert. denied*, 464 U.S. 865 (1983); *Christopher*, 407 So.2d at 202. In *Christopher*, the defendant, while visiting his natural daughter and her adoptive parents, began an affair with her. When the mother learned Christopher planned to leave with his daughter and confronted him, he shot and killed her. The husband came home later and, not realizing anything was wrong, took Christopher to the bank to lend him some money. When they returned home, Christopher knocked him down and then shot him to death. The Florida Supreme Court upheld the heinousness finding, simply saying the trial court could exercise reasoned judgment. *Ibid.*

In *Magill*, the court rejected a contention that it had in 1983 so expanded the heinous aggravator as to make it unconstitutional, but the court's justification shows an aggravator just that expansive.

> It is not merely the specific and narrow method in which a victim is killed which makes a murder heinous, atrocious, and cruel; rather *it is the entire set of circumstances surrounding the killing* . . .
>
> There can be no mechanical, litmus, test established for determining whether this or any aggravating factor is applicable. Instead, the facts must be considered in light of prior cases addressing the issue and must be compared and contrasted therewith and weighed in light thereof. Then, if the killing and its attendant circumstances do not warrant the finding of heinousness, atrociousness, and cruelty, it will be stricken. Otherwise, assuming that it is warranted in light of earlier cases and that the trial judge used the reasoned judgment which is so necessary, the finding will not be disturbed.

Id. at 651. The Florida Supreme Court does not explain how the trial court can exercise reasoned judgment to sentence a man to die when the only direction given by the statute, as the appellate court interprets it, is to look at all the circumstances of the crime. Relying on all the circumstances of the crime allows the sentencer uncontrolled discretion to impose death based solely on the subjective reactions of the sentencer. As the Tenth Circuit Court of Appeals explained:

> We agree that all of the circumstances surrounding a murder must be examined to determine whether the murder was "especially heinous, atrocious, or cruel," but there must be some objective standard that specifies which circumstances support such a determination. Consideration of all the circumstances is permissible; reliance upon all the circumstances is not . . . No objective standards limit that discretion.

Cartwright, 822 F.2d at 1491. Such a command directly conflicts with the holdings of *Cartwright*, *Godfrey*, and *Furman* itself.

Furthermore, simply pointing to the case law hardly provides guidance. The only conclusion one could reach in light of the multiple, inconsistent definitions of the circumstances and flatly contradictory results of factually indistinguishable cases is that the Florida courts know a heinous crime when they see one. Such a principle does not provide sentencers with meaningful guidance in imposing death, but rather invites them to condemn a man to be killed based on pure whimsy.

D. Failing to Settle on One or More Definitions of the Circumstance Which Considered Together Limit Its Application Means the Florida Supreme Court's Analysis Has Been Infected by Rather Than Cured the Facial Vagueness of the Statute.

This history of describing Florida's heinous, atrocious, or cruel aggravating circumstance relying on multiple, inconsistent, sometimes unlimited definitions shows there is no objective principle which limits it. In only a very few cases does the appellate court even purport to apply a properly limited definition of the aggravator; no defendant can know if he will be one of the lucky few to have this limitation applied.

This arbitrariness is shown above in discussing some of the inconsistent definitions of the circumstance applied by the Florida Supreme Court. Thus, in *Grossman*, 525 So.2d 833, the Florida courts found the crime especially heinous because a police officer was ferociously beaten as she fought for her life and killed when the defendant wrestled away her weapon and shot her once. Yet, three months after *Grossman* was decided and two weeks before its rehearing was denied, in *Brown*, 526 So.2d 903, heinousness was struck although the defendant struggled with a policeman, shot him in the arm with his firearm, causing "excruciating pain," and ignored the officers' pleas not to be killed, shooting him fatally twice in the head.

This thorny tangle of case law produces many other materially identical fact patterns with dramatically inconsistent results. The most startling inconsistency can

be seen by comparing *Raulerson v. State*, 358 So.2d 826 (Fla.), *cert. denied*, 439 U.S. 959 (1978) with the opinion on the same crime in *Raulerson v. State*, 420 So.2d 567 (Fla. 1982), *cert. denied*, 463 U.S. 1249 (1983). In *Raulerson I*, the defendant shot a policeman to death who had interrupted a felony; the Florida Supreme Court rejected a claim that the victim's instantaneous death meant the crime was not heinous:

> This crime was committed during the course of the robbery and immediately after a rape. There were many shots fired and the deceased was well aware that his life was in danger from the moment he entered the restaurant. This was not a sudden attack, but was part of a general robbery scheme.

Raulerson I, 358 So.2d at 834. In *Raulerson II*, the court held precisely the opposite, citing cases in which it struck heinousness because death was quick. 420 So.2d at 572. Even for the same crime, the court could not come to the same result. In another case, the victim became aware of his impending doom only long enough to raise his hand. *Huff, supra*. Yet, in *Parker v. State*, 458 So.2d 750, 754 (Fla. 1984), *cert. denied*, 470 U.S. 1088 (1985), the victim was taken to an isolated spot by her killers, fell to her knees and covered her face upon seeing the dead body of her boyfriend there. She then was shot. The court found that crime not heinous. In *Breedlove*, 413 So.2d at 9, (final in May, 1982) the court found the crime especially heinous because it occurred in the victim's bed, even though the victim suffered little; yet, in *Simmons v. State*, 419 So.2d 316, 319 (Fla. 1982) (decided in August), the court struck the circumstance since the victim died nearly instantaneously, and saying "The finding that the victim was murdered in his own home offers no support for . . . ." heinousness. When the homicide victim is first a victim of a felony, the court will often focus on victim's terror during the felony to establish heinousness.[10] *See*

[10] Florida law allows the crime to be aggravated if it occurs during the commission of an enumerated felony, above and apart from the heinousness aggravator. § 921.141(5)(d), Fla. Stat. (1989).

e.g., Swafford v. State, 533 So.2d 270 (Fla. 1988), *cert. denied*, 109 S.Ct. 1578 (1989) (citing cases) (victim's kidnap and sexual abuse before killing by multiple shots supported finding of heinousness). However, in *Robinson v. State*, 574 So.2d 108 (Fla. 1991), *cert. denied*, 112 S.Ct. 131 (1991), the defendant had kidnapped a victim, handcuffed her, and he and his companion raped her; heinousness was struck because she was killed by two shots before which her abductors had assured her she would be released after they had had sex. *Id.* at 112. Although in numerous cases, such as *Troedel, supra* and *Ponticelli, supra*, the suffering of a shooting victim after the shooting establishes a heinous circumstance, in *Teffeteller*, 439 So.2d 840, the victim was killed by a single shotgun blast to his abdomen during an attempted robbery "but remained conscious and coherent for about three hours." *Id.* at 842. Yet, "The fact that the victim lived for a couple of hours in undoubted pain and knew that he was facing imminent death, horrible as this prospect may have been, does not set this senseless murder apart from the norm af capital felonies." *Id.* at 846. The court explains, directly contrary to the cases in which it relies on victim suffering to establish heinousness:

> In this case the death instrumentality was a .410 shotgun fired at close range. Whether death is immediate or whether the victim lingers and suffers is pure fortuity. The intent and method employed by the wrongdoers is what needs to be examined.

Mills, 476 So.2d at 178.

The Florida Supreme Court's own inability to apply its case law in a consistent manner dramatically shows that the sentencer, even if presumed to know this case law, cannot gain meaningful guidance from it. These inconsistencies are explainable, but only because the Florida Supreme Court maintains numerous varying definitions of heinousness. The Florida Supreme Court often could choose not to find a crime heinous, dependent on which of the numerous varying definitions it will rely, but in-

stead may choose another denition which may itself be limited but includes the kind of case in question as heinous. Some choices allow the sentencer to apply the heinous circumstance to any first degree murder. The cases, considered together, as in fairness they must be since the sentencer must look to all of them, show no clear, objective limit on the vague words of Florida's heinous aggravator exists. Absent such a limit, this portion of Florida's statute must be struck as unconstitutional.

CONCLUSION

For the foregoing reasons, the Volunteer Lawyers' Resource Center respectfully urges this Court to reverse the decision of the Florida Supreme Court and remand for further proceedings consistent with this Court's opinion.

Respectfully submitted,

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January 2, 1992

APPENDIX

APPENDIX

POST-1983 FLORIDA CASES IN WHICH THE TRIAL COURT FOUND HEINOUSNESS, BY YEAR

——1984——

Pope v. State, 441 So.2d 1073 (Fla. 1984).

Bottoson v. State, 443 So.2d 962 (Fla.), *cert. denied*, 469 U.S. 872 (1984).

Maxwell v. State, 443 So.2d 967 (Fla. 1984).

Clark v. State, 443 So.2d 973 (Fla.), *cert. denied*, 467 U.S. 1210 (1984).

Sims v. State, 444 So.2d 922 (Fla.), *cert. denied*, 467 U.S. 1246 (1984).

Preston v. State, 444 So.2d 939 (Fla. 1984).

Rambert v. State, 445 So.2d 337 (Fla. 1984).

Oats v. State, 446 So.2d 90 (Fla. 1984).

Lusk v. State, 446 So.2d 1038 (Fla.), *cert. denied*, 469 U.S. 873 (1984).

Heiney v. State, 447 So.2d 210 (Fla.), *cert. denied*, 469 U.S. 920 (1984).

Bassett v. State, 449 So.2d 803 (Fla. 1984).

Squires v. State, 450 So.2d 208 (Fla.), *cert. denied*, 469 U.S. 892 (1984).

Jackson v. State, 451 So.2d 458 (Fla. 1984).

Blanco v. State, 452 So.2d 520 (Fla. 1984), *cert. denied*, U.S. 1181 (1985).

Card v. State, 453 So.2d 17 (Fla.), *cert. denied*, 469 U.S. 989 (1984).

Mann v. State, 453 So.2d 784 (Fla. 1984), *cert. denied*, 469 U.S. 1181 (1985).

James v. State, 453 So.2d 786 (Fla. 1984), *cert. denied*, 469 U.S. 1098 (1985).

Jennings v. State, 453 So.2d 1109 (Fla. 1984), vacated, 470 U.S. 1002, *rev'd on other grounds*, 473 So.2d 204 (Fla. 1985).

Gorham v. State, 454 So.2d 556 (Fla. 1984), *cert. denied*, 469 U.S. 1181 (1985).

Bundy v. State, 455 So.2d 330 (Fla. 1984), *cert. denied*, 476 U.S. 1109 (1986).

Kennedy v. State, 455 So.2d 351 (Fla. (1984), *cert. denied*, 469 U.S. 1197 (1985).

Thomas v. State, 456 So.2d 454 (Fla. 1984).

Lemon v. State, 456 So.2d 885 (Fla. 1984), *cert. denied*, 469 U.S. 1230 (1985).

Groover v. State, 458 So.2d 226 (Fla. 1984), *cert. denied*, 471 U.S. 1009 (1985).

Parker v. State, 458 So.2d 750 (Fla. 1984), *cert. denied*, 470 U.S. 1088 (1985).

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Doyle v. State, 460 So.2d 353 (Fla. 1985).

Stano v. State, 460 So.2d 890 (Fla.), *cert. denied*, 471 U.S. 1111 (1985).

Davis v. State, 461 So.2d 67 (Fla., *cert. denied*, 473 U.S. 913 (1985).

Troedel v. State, 462 So.2d 392 (Fla. 1985).

Duest v. State, 462 So.2d 446 (Fla. 1985).

Mills v. State, 462 So.2d 1075 (Fla.), *cert. denied*, 473 U.S. 911 (1985).

Randolph v. State, 463 So.2d 186 (Fla.), *cert. denied*, 473 U.S. 907 (1985).

Henderson v. State, 463 So.2d 196 (Fla., *cert. denied*, 473 U.S. 916 (1985).

Bates v. State, 465 So.2d 490 (Fla. 1985), *after remand*, 506 So.2d 1033, *cert. denied*, 108 S.Ct. 212 (1987).

Johnson v. State, 465 So.2d 499 (Fla.), *cert. denied*, 474 U.S. 865 (1985).

Medina v. State, 466 So.2d 1046 (Fla. 1985).

Barclay v. State, 470 So.2d 691 (Fla. 1985).

Bundy v. State, 471 So.2d 9 (Fla. 1985), *cert. denied*, 479 U.S. 894 (1986).

Francis v. State, 473 So.2d 672 (Fla.), *cert. denied*, 474 U.S. 1094 (1985).

Brown v. State, 473 So.2d 1260 (Fla.), *cert. denied*, 474 U.S. 1038 (1985).

Wright v. State, 473 So.2d 1277 (Fla.), *cert. denied*, 474 U.S. 1094 (1985).

Valle v. State, 474 So.2d 796 (Fla. 1985), *vacated*, 476 U.S. 1102 (1986), *rev'd on other grounds*, 502 So.2d 1225 (Fla. 1987), *after remand*, 581 So.2d 40 (Fla.), *cert. denied*, 60 U.S.L.W. 3404 (U.S. December 2, 1991) (No. 91-5974).

Ross v. State, 474 So.2d 1170 (Fla. 1985).

Hoffman v. State, 474 So.2d 1178 (Fla. 1985).

Gore v. State, 475 So.2d 1205 (Fla. 1985), *cert. denied*, 475 U.S. 1031 (1986).

Roman v. State, 475 So.2d 1228 (Fla. 1985), *cert. denied*, 475 U.S. 1090 (1986).

Bertolotti v. State, 476 So.2d 130 (Fla. 1985).

Parker v. State, 476 So.2d 134 (Fla. 1985).

Mills v. State, 476 So.2d 172 (Fla. 1985), *cert. denied*, 475 U.S. 1031 (1986).

Cave v. State, 476 So.2d 180 (Fla. 1985), *cert. denied*, 476 U.S. 1178 (1986).

Phillips v. State, 476 So.2d (194 Fla. 1985).

Hooper v. State, 476 So.2d 1253 (Fla. 1985), *cert. denied*, 475 U.S. 1098 (1986).

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Deaton v. State, 480 So.2d 1279 (Fla. 1986).

Byrd v. State, 481 So.2d 468 (Fla.), *cert. denied*, 476 U.S. 1153 (1986).

Amazon v. State, 487 So.2d 8 (Fla.), *cert. denied*, 479 U.S. 914 (1986).

Marek v. State, 492 So.2d 1055 (Fla. 1986).

Cooper v. State, 492 So.2d 1059 (Fla. 1986), *cert. denied*, 479 U.S. 1101 (1987).

Kokal v. State, 492 So.2d 1317 (Fla. 1986).

Wilson v. State, 493 So.2d 1019 (Fla. 1986).

Muhammad v. State, 494 So.2d 969 (Fla. 1986), *cert. denied*, 479 U.S. 1101 (1987).

Scott v. State, 494 So.2d 1134 (Fla. 1986).

Lambrix v. State, 494 So.2d 1143 (Fla. 1986).

Huff v. State, 495 So.2d 145 (Fla. 1986).

Way v. State, 496 So.2d 126 (Fla. 1986), *sentence vacated on other grounds*, 568 So.2d 1263 (Fla. 1990).

Irizarry v. State, 496 So.2d 822 (Fla. 1986).

Johnston v. State, 497 So.2d 863 (Fla. 1986).

Atkins v. State, 497 So.2d 1200 (Fla. 1986).

Floyd v. State, 497 So.2d 1211 (Fla. 1986), *after remand*, 569 So.2d 1225 (Fla. 1990), *cert. denied*, 111 S.Ct. 2912 (1991).

Jackson v. State, 498 So.2d 906 (Fla. 1986).

Melendez v. State, 498 So.2d 1258 (Fla. 1986).

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Jackson v. State, 502 So.2d 409 (Fla.), *cert. denied*, 482 U.S. 920 (1987).

Tompkins v. State, 502 So.2d 415 (Fla.), *cert. denied*, 483 U.S. 1033 (1987).

Wasko v. State, 505 So.2d 1314 (Fla. 1987).

Bates v. State, 506 So.2d 1033 (Fla.), *cert. denied*, 484 U.S. 872, 873 (1987).

Ferry v. State, 507 So.2d 1373 (Fla. 1987).

Niebert v. State, 508 So.2d 1 (Fla. 1987).

Hansbrough v. State, 509 So.2d 1081 (Fla. 1987).

Craig v. State, 510 So.2d 857 (Fla.), *cert. denied*, 484 U.S. 1020 (1987).

Engle v. State, 510 So.2d 881 (Fla. 1987), *cert. denied*, 485 U.S. 924 (1988).

Roberts v. State, 510 So.2d 885 (Fla. 1987), *cert. denied*, 485 U.S. 943 (1988).

Jennings v. State, 512 So.2d 169 (Fla. 1987), *cert. denied*, 484 U.S. 1079 (1988).

Kight v. State, 512 So.2d 922 (Fla. 1987), *cert. denied*, 485 U.S. 929 (1988).

Koon v. State, 513 So.2d 1253 (Fla. 1987).

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Smith v. State, 515 So.2d 182 (Fla. 1987), *cert. denied*, 485 U.S. 971 (1988).

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Hardwick v. State, 521 So.2d 1071 (Fla., *cert. denied*, 488 U.S. 871 (1988).

Holsworth v. State, 522 So.2d 348 (Fla. 1988).

Jackson v. State, 522 So.2d 802 (Fla.), *cert. denied*, 488 U.S. 871 (1988).

Perry v. State, 522 So.2d 817 (Fla. 1988).

Correll v. State, 523 So.2d 562 (Fla.), *cert. denied*, 488 U.S. 871 (1988).

Lloyd v. State, 524 So.2d 396 (Fla. 1988).

Grossman v. State, 525 So.2d 833 (Fla.), *cert. denied*, 489 U.S. 1071 (1989).

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Mitchell v. State, 527 So.2d 179 (Fla), *cert. denied*, 488 U.S. 960 (1988).

Buenoano v. State, 527 So.2d 194 (Fla. 1988).

Garron v. State, 528 So.2d 353 (Fla. 1988).

Long v. State, 529 So.2d 286 (Fla. 1988).

Harvey v. State, 529 So.2d 1083 (Fla. 1988), *cert. denied*, 489 U.S. 1040 (1989).

Turner v. State, 530 So.2d 45 (Fla. 1988), *cert. denied*, 489 U.S. 1040 (1989).

Jackson v. State, 530 So.2d 269 (Fla.), *cert. denied*, 488 U.S. 1051 (1988).

Hildwin v. State, 531 So.2d 124 (Fla. 1988), aff'd, 490 U.S. 639 (1989).

Amoros v. State, 531 So.2d 1256 (Fla. 1988).

Lamb v. State, 532 So.2d 1051 (Fla. 1988).

Swafford v. State, 533 So.2d 270 (Fla. 1988), *cert. denied*, 109 S.Ct. 1578 (1989).

Bryan v. State, 533 So.2d 744 (Fla. 1988), *cert. denied*, 490 U.S. 1028 (1989).

Scull v. State, 533 So.2d 1137 (Fla. 1988), *cert. denied*, 490 U.S. 1037 (1988).

Chandler v. State, 534 So.2d 701 (Fla. 1988), *cert. denied*, 490 U.S. 1076 (1989).

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Schafer v. State, 537 So.2d 988 (Fla. 1989).

Ramirez v. State, 542 So.2d 342 (Fla. 1989).

Cook v. State, 542 So.2d 964 (Fla. 1989), *after remand*, 581 So.2d 141 (Fla. 1991).

Cherry v. State, 544 So.2d 184 (Fla. 1989), *cert. denied*, 110 S.Ct. 1835 (1990).

Rutherford v. State, 545 So.2d 843 (Fla. 1989).

Mendyk v. State, 545 So.2d 846 (Fla.), *cert. denied*, 110 S.Ct. 520 (1989).

Dudley v. State, 545 So.2d 857 (Fla. 1989).

Pentecost v. State, 545 So.2d 861 (Fla. 1989).

Rivera v. State, 545 So.2d 864 (Fla. 1989).

Smalley v. State, 546 So.2d 720 (Fla. 1989).

Castro v. State, 547 So.2d 111 (Fla. 1989).

Freeman v. State, 547 So.2d 125 (Fla. 1989).

Walton v. State, 547 So.2d 622 (Fla.), *cert. denied*, 110 S.Ct. 759 (1989).

Hamilton v. State, 547 So.2d 630 (Fla. 1989).

Cochran v. State, 547 So.2d 928 (Fla. 1989).

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Thompson v. State, 553 So.2d 153 (Fla. 1989), *cert. denied*, 110 S.Ct. 2194 (1990).

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Morris v. State, 557 So.2d 27 (Fla. 1990).

Reed v. State, 560 So.2d 203 (Fla.), *cert. denied*, 111 S.Ct. 230 (1990).

Hallman v. State, 560 So.2d 223 (Fla. 1990).

Rivera v. State, 561 So.2d 536 (Fla. 1990).

Blakely v. State, 561 So.2d 560 (Fla. 1990).

Randolph v. State, 562 So.2d 331 (Fla.), *cert. denied*, 111 S.Ct. 538 (1990).

Porter v. State, 564 So.2d 1060 (Fla. 1990), *cert. denied*, 111 S.Ct. 1024 (1991).

Hall v. State, 568 So.2d 882 (Fla. 1990).

Duckett v. State, 568 So.2d 891 (Fla. 1990).

Chesire v. State, 568 So.2d 908 (Fla. 1990).

Farinas v. State, 569 So.2d 425 (Fla. 1990).

Floyd v. State, 569 So.2d 1225 (Fla. 1990), *cert. denied*, 111 S.Ct. 2912 (1991).

Sanchez-Velasco v. State, 570 So.2d 908 (Fla. 1990), *cert. denied*, 111 S.Ct. 2045 (1991).

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Campbell v. State, 571 So.2d 415 (Fla. 1990).

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Nixon v. State, 572 So.2d 1336 (Fla. 1991).

Holton v. State, 573 So.2d 284 (Fla.), *cert. denied*, 111 S.Ct. 2275 (1991).

Bruno v. State, 574 So.2d 76 (Fla.), *cert. denied*, 112 S. Ct. 112 (1991).

Robinson v. State, 574 So.2d 108 (Fla.), *cert. denied*, 112 S.Ct. 131 (1991).

Williams v. State, 574 So.2d 136 (Fla. 1991).

Nibert v. State, 574 So.2d 1059 (Fla. 1991).

Penn v. State, 574 So.2d 1079 (Fla. 1991).

Downs v. State, 574 So.2d 1095 (Fla. 1991).

Douglas v. State, 575 So.2d 165 (Fla. 1991).

Hegwood v. State, 575 So.2d 170 (Fla. 1991).

Trotter v. State, 576 So.2d 691 (Fla. 1991).

Hitchcock v. State, 578 So.2d 685 (Fla.), *cert. denied*, 112 S.Ct. 311 (1991).

McKinney v. State, 579 So.2d 80 (Fla. 1991).

Shere v. State, 579 So.2d 86 (Fla. 1991).

Zeigler v. State, 580 So.2d 127 (Fla), *cert. denied*, 112 S.Ct. 390 (1991).

Sochor v. State, 580 So.2d 595 (Fla), *cert. granted*, 60 U.S.L.W. 3374 (U.S. November 14, 1991) (No. 91-5843).

Derrick v. State, 581 So.2d 31 (Fla. 1991).

Scott v. State, 581 So.2d 887 (Fla. 1991).

Gilliam v. State, 582 So.2d 610 (Fla. 1991).

McCrae v. State, 582 So.2d 613 (Fla. 1991).

Burns v. State, 16 Fla.L.W. S389 (Fla. May 16, 1991).

Christophoēr v. State, 16 Fla.L.W. S410 (Fla. May 30, 1991).

Green v. State, 16 Fla.L.W. S437 (Fla. June 6, 1991).

Capehart v. State, 16 Fla.L.W. S447 (Fla. June 13, 1991).

Taylor v. State, 16 Fla.L.W. S469 (Fla. June 27, 1991).

Espinosa v. State, 16 Fla.L.W. S489 (Fla. July 11, 1991).

Beltran-Lopez v. State, 16 Fla.L.W. S492 (Fla. July 11, 1991).

Henry v. State, 16 Fla.L.W. S593 (Fla. August 29, 1991).

Wright v. State, 16 Fla. L.W. S595 (Fla. August 29, 1991).

MaQueira v. State, 16 Fla.L.W. S599 (Fla. August 29 1991).

Davis v. State, 16 Fla.L.W. S602 (Fla. September 5, 1991).

Craig v. State, 16 Fla.L.W. S604 (Fla. September 5, 1991).

Bowden v. State, 16 Fla.L.W. S614 (Fla. September 2, 1991).

Sireci v. State, 16 Fla.L.W. S623 (Fla. September 19, 1991).

Santos v. State, 16 Fla.L.W. S633 (Fla. September 26, 1991).

Bedford v. State, 16 Fla.L.W. S665 (Fla. October 10, 1991).

Ponticelli v. State, 16 Fla.L.W. S669 (Fla. October 10, 1991).

Tillman v. State, 16 Fla.L.W. S674 (Fla. October 17, 1991).